In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-592

SHIRLEY JEAN SUTHERLAND, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, an alien temporary visitor who overstayed her period of admission, contends that she is entitled to relief under Section 241(f) of the Immigration and Nationality Act, as amended, 18 U.S.C. 1251, because of an alleged fraud she committed at the time of entry into the country.

Petitioner, a citizen of Canada, was admitted into the United States at Los Angeles, California, on November 6, 1970, as a nonimmigrant visitor and authorized to remain in this country until May 6, 1971. She was granted an extension of stay until October 6, 1971. Petitioner has two children who have been admitted for permanent residence.[1]

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[1]After petitioner and her husband, Donald Sutherland, had been divorced, he and their two children received immigrant visas from the American Consulate in Montreal, Canada, and re-entered the country as lawful permanent residents.

On September 19, 1972, an Order to Show Cause was issued alleging that petitioner was deportable pursuant to Section 241(a)(2) of the Act, as amended, 8 U.S.C. 1251(a)(2). During the hearing, petitioner moved for a termination of the deportation proceedings pursuant to Section 241(f), 8 U.S.C. 1251(f), on the ground that she had committed fraud upon her entry into the country.[2] The Immigration judge rejected her contention and found her deportable as charged (Pet. App. 1). The Board of Immigration Appeals dismissed the appeal (Pet. App. 5). The court of appeals affirmed (Pet. App. 8).

1. Petitioner's contention that her deportation pursuant to Section 241(a)(2) is waived by Section 241(f) because of her entry as a temporary visitor into the United States by fraud (and her relationship to her two resident alien children) is not supported by *Immigration and Naturalization Service* v. *Errico*, 385 U.S. 214.[3] In *Errico*, this Court held that Section 241(f) waives only those deportation charges which result directly from the misrepresentation, provided that the alien was otherwise admissible at the time of entry. The charge against petitioner, that she overstayed her period of admission, does not result directly from fraud at entry. *Milande* v. *Immigration and Naturalization Service*, 484 F. 2d 774, 776 (C.A. 7); *Cabuco-Flores* v. *Immigration and Naturalization Service*, 477 F. 2d 108, 110 (C.A. 9), certiorari denied, 414 U.S. 841. Petitioner is deportable

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[2]Petitioner contends that she concealed her intention to immigrate to the United States and that she had been indicted for possession of explosives in violation of 18 U.S.C. 2, 371 and 26 U.S.C. 5861(d).

[3]The Court in *Errico* was not concerned with an overstayed visitor's visa but with two immigrants who had gained entry by fraud. One had received first preference quota status by misrepresenting his occupational experience; the other had entered into a fraudulent proxy marriage with a United States citizen in order to obtain nonquota status. When the Immigration and Naturalization Service sought to deport these immigrants because of quota irregularities, the Court held that Section 241(f) waived such deportation which resulted directly from their fraud.

solely because she has failed to depart from the country upon expiration of her authorized temporary stay. Her deportability is unrelated to any misrepresentations which she may have made upon entry.[4]

Additionally, we note, that the legislative history relied upon by the Court in *Errico* indicates that Section 241(f) is limited to those who have entered as immigrants through the visa issuing process.[5] Neither by express terms nor by implication did *Errico* extend Section 241(f) treatment to those aliens who enter as visitors and thereby circumvent the visa immigration system.

2. Nor is there a conflict in the circuits, after the decision in *Errico,* concerning the deportability for overstay of a temporary visitor who commits fraud at entry. The courts have uniformly held that Section 241(f) is applicable only if fraud is germane to the charge and that fraud at entry is irrelevant to a charge of overstay. *Milande* v. *Immigration and Naturalization Service, supra,* 484 F. 2d at 776; *Preux* v. *Immigration and Naturalization Service,* 484 F. 2d 396, 397 (C.A. 10), certiorari denied, 415 U.S. 916; *Cabuco-Flores* v. *Immigration and Naturalization Service, supra,* 477 F. 2d at 110; *Jolley* v. *Immigration and Naturalization Service,*

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[4]The Immigration judge found that her conduct at entry was not fraudulent (Pet. App. 3).

[5]See, *Iqbal* v. *Immigration and Naturalization Service,* C.A. 9, No. 72-2539, decided June 27, 1973, which held that Section 241(f) applies only to aliens who enter as immigrants.

441 F. 2d 1245, 1251-1252 (C.A. 5), certiorari denied, 404 U.S. 946; *Muslemi* v. *Immigration and Naturalization Service*, 408 F. 2d 1196, 1199 (C.A. 9).[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.

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[3]Petitioner refers to the conflict concerning whether a person who enters the country under a false claim of citizenship is entitled to Section 241(f) relief. *Reid* v. *Immigration and Naturalization Service*, 492 F. 2d 251 (C.A. 2), certiorari granted October 15, 1974, No. 73-1541 (Section 241(f) relief not available); *Lee Fook Chuey* v. *Immigration and Naturlization Service*, 439 F. 2d 244 (C.A. 9) (such relief available). However, resolution of this issue is not related to the question presented herein; thus, there is no need to hold this case in abeyance until *Reid* has been decided.